Malaysia British Assurance Bhd v Syarikat Pembenaan Karun Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–1 OF 2007

RAUS SHARIF, ABDULL HAMID EMBONG AND AHMAD MAAROP JJCA

6 AUGUST 2008

Insurance — Contractors' all risks policy — Award under — Appeal against quantum — Whether award of damages by trial judge can be supported

Insurance — Contractors' all risks policy — Liability — Appeal against — Construction of policy — Terms of clause on period of cover state that 'insurers' liability expires for parts of the insured contract works taken over or put into service' — Whether words ought to be given plain and ordinary meaning — Whether trial judge had erred in applying contra preferentum rule in construction of policy — Whether trial judge had erred in taking into account object of policy

The plaintiff/respondent ('the respondent') was appointed by the Government of Malaysia as the contractor to carry out and complete a project (the project) that included the construction of a bridge over Sungai Lingkungan ('the bridge') to replace an existing bridge that stood some 2km from the proposed construction. Under the appointment the respondent was required to provide, inter alia, an insurance of works policy and a contractor's all risks insurance policy to provide coverage until 31 January 2002. The respondent accordingly applied to the defendant/appellant ('the appellant') for the issuance of the required insurance policy for the project. The appellant agreed to insure the respondent for the project and to indemnify the respondent against loss and damage to the contract works, subject to the terms and conditions of the policy, for the period from 10 July 1998 to 31 January 2002 and a further 12-month period, being the maintenance period. Before the completion of the project, the bridge was completed and opened for use by the public to ensure that there was no interruption on the traffic flow across the river. On or about 23 November 2000, the bridge was damaged by a flood and/or storm and the respondent carried out repair works for the bridge. Thereafter the respondent submitted its claim to the appellant demanding payment for the cost of repair of the bridge but the appellant denied liability relying on a clause on the period of cover which provided that 'the insurers' liability expires for parts of the insured contract works taken

over or put into service' ('the cover clause'). The respondent then sued the appellant under the policy and sought to claim RM765,812.20 as the cost of repair of the bridge. The appellant's defence, relying on the cover clause, was that since the bridge was already put into service, its liability under the policy expired. The High Court entered judgment for the respondent in the sum of RM765,812.20 together with interest and costs. Hence this appeal wherein the appellant had appealed against liability and the quantum of damages awarded. The appellant in its grounds of appeal had submitted, inter alia, that the trial judge had erred in applying the contra preferentum rule in the construction of the policy of insurance when there was no ambiguity and that the words used in the policy ought to be given their plain and ordinary meaning; and that the trial judge had erred in using the works contract to support his construction of the insurance policy. However, the respondent submitted that the literal meaning should not be allowed to prevail as it would produce an unrealistic and generally unanticipated result in which the insurer would be absolved of the very risk sought to be covered under the policy. The respondent further submitted that as the intention of the parties in this case was the provision of a policy with the necessary cover, including coverage for works completed and taken over by the Government of Malaysia, the trial judge was correct in applying the purposive approach in enforcing the intention of the parties. The central issue for determination in this case was whether the rule of construction adopted by the trial judge when construing the provision in the insurance policy relating to the period of cover under the policy was correct.

Held, dismissing the appeal and substituting the award of RM765,812.20 with an award of RM380,000 with costs:

(1) The rules of construction that apply to commercial contracts also apply to the construction of the policy in the instant appeal. In construing the insurance policy the object of the parties is to be steadily borne in mind and the policy must not be construed so as to defeat that object or to render it practically illusory. The trial judge in this case had taken into account the circumstances leading to the purchase of the insurance policy, which was the object of taking out the policy. Clause 36(a) of the works contract makes it clear that irrespective of any sectional completion and partial occupation by the Federal Government under the works contract, the contractor shall keep all work executed, and materials and goods insured until the completion of the project. Therefore it appears that the trial judge was correct in taking into account the works contract and thereby concluding that the object of taking the insurance policy was necessarily to comply with the works contract, which under cl 36(a) required the respondent to take out an

insurance policy with the necessary cover which included coverage for contract works completed and taken over by the Government of Malaysia (see paras 26, 27 & 29).

(2) In addition, as the trial judge had found, the appellant was made aware of the requirement under cl 36(a) of the works contract, and hence the object of taking out the insurance policy in this case (see para 30).

(3) The trial judge concluded that the cover clause, which put an end to the insurance cover if the bridge was put into use, was contradictory to the maintenance provision, which still provided for cover for 12 months after the bridge was completed and put to use. This contradiction created an ambiguous situation raising the necessary question whether the parties had actually intended the cover to end when there was a sectional completion of the project ie when the bridge was completed or when there was partial occupation ie when the bride was opened for public use. In the face of such an ambiguity the trial judge was right in adopting the construction favourable to the respondent and therefore to hold that the damage by flood was covered by the insurance policy (see para 31).

(4) In the instant appeal, upholding the appellant's interpretation of giving the words in the policy their plain and ordinary meaning would lead to the consequence that merely because the bridge was opened for public use the respondent was deprived of the cover under the policy. This was so even though the purpose of the policy was to provide the necessary cover for executed work, materials and goods until the completion of the whole project irrespective of any sectional completion or partial occupation of the project by the government; and this was absurd (see para 34).

(5) With regard to whether the respondent had proven its alleged loss of RM765,812.20, it was found that that this amount was just an estimated amount. At the same time it was true that the only evidence adduced by the appellant was that of a loss adjuster who could not say how much it would cost to remedy the bridge. However, one of the subcontractors for the project who was called as a witness for the respondent gave evidence that the costs involved in the remedial works on the bridge was RM380,000 plus. In the light of this evidence the award of RM765,812.20 made by the trial judge could not be supported. Thus, the sum of RM765,812.20 that the respondent sought to claim from the appellant under the policy was not proven on the balance of probability (see para 37–41).

[Bahasa Malaysia summary

Plaintif/responden ('responden') telah dilantik oleh Kerajaan Malaysia sebagai

kontraktor untuk melaksanakan dan menyiapkan sebuah projek (projek) termasuklah menyiapkan sebuah jambatan menyeberangi Sungai Linkungan ('jambatan') bagi menggantikan jambatan sedia ada yang didirikan kira-kira 2km daripada jambatan yang dicadangkan. Dibawah perlantikkan responden dikehendaki menyediakan, antara lain, polisi insurans kerja dan polisi insurans kontraktor bagi keseluruhan risiko bagi menyediakan perlindungan sehingga 31 Januari 2002. Responden selanjutnya memohon kepada defendan/perayu ('perayu') bagi pengeluaran polisi insurans yang diperlukan bagi projek tersebut. Perayu bersetuju untuk melindungi responden untuk projek dan membayar ganti rugi kepada responden terhadap kehilangan dan kerugian kepada kerja-kerja kontrak, tertakluk kepada terma-terma dan syarat-syarat polisi, untuk tempoh masa dari 10 Julai 1998 sehingga 31 Januari 2002 dan untuk tempoh 12 bulan, sebagai tempoh masa penyelenggaraan. Sebelum tempoh akhir projek disiapkan, jambatan telah disiapkan dan dibuka untuk kegunaan awam bagi memastikan tiada gangguan terhadap aliran lalulintas menyeberangi sungai. Pada atau kira-kira 23 November 2000, jambatan telah dimusnahkan oleh banjir dan/atau ribut dan responden telah menjalankan kerja-kerja baikpulih ke atas jambatan. Selanjutnya responden telah menyerahkan tuntutannya kepada perayu bagi mendapatkan bayaran kos baikpulih jambatan tetapi perayu menafikan liabiliti berdasarkan kepada klausa dalam tempoh perlindungan yang memperuntukkan bahawa liabiliti 'syarikat insurans' akan tamat bagi sebahagian daripada kontrak kerja yang diinsuranskan diambil alih atau diletakkan dalam perkhidmatan ('klausa perlindungan'). Responden seterusnya memfailkan tindakan guaman terhadap perayu di bawah polisi dan memohon tuntutan RM765,812.20 sebagai kos baikpulih jambatan. Pembelaan defendan, dengan bergantung kepada klausa perlindungan, adalah memandangkan jambatan telah dibuka, liabilitinya di bawah polisi telahpun berakhir. Mahkamah Tinggi memasukkan penghakiman untuk responden berjumlah RM765,812.20 berserta faedah dan kos. Maka rayuan ini di mana perayu merayu terhadap liabiliti dan kuantum ganti rugi yang telah diawardkan. Perayu dalam alasan-alasan rayuan telah berhujah, antara lain, bahawa hakim bicara telah terkhilaf dalam menggunapakai kaedah contra preferentum dalam pentafsiran polisi insurans bila tiada keraguan dan bahawa perkataan-perkataan yang digunakan di dalam polisi hendaklah diberikan tafisran jelas dan biasa; dan hakim bicara telah terkhilaf dalam menggunakan kontrak kerja bagi menyokong pentafsiran polisi insurans tersebut. Walaubagaimanapun, repsonden berhujah bahawa maksud literal tidak boleh dibenarkan untuk diberikan keutamaan kerana ia akan menyebabkan keputusan yang tidak realistik dan tidak boleh dijangkakan yang mana syarikat insurans akan menyerap semua risiko yang dipohon yang dilindungi di bawah polisi. Responden selanjutnya berhujah bahawa memandangkan niat pihak-pihak dalam kes ini peruntukan polisi dengan perlindungan sewajarnya, termasuk perlindungan untuk kerja-kerja yang telah disiapkan dan telah diambil alih oleh Kerajaan Malaysia, hakim bicara

A adalah betul dalam menggunapakai pendekatan maksud dalam melaksanakan hasrat pihak-pihak. Isu yang diketengahkan untuk diputuskan dalam kes ini adalah sama ada kaedah pentafsiran yang digunakan oleh hakim bicara apabila mentafisrkan peruntukan polisi insurans berkenaan dengan tempoh masa perlindungan di bawah polisi adalah tepat.

B

Diputuskan, menolak rayuan dan menggantikan award RM765,812.20 dengan award berjumlah RM380,000 dengan kos:

C (1) Kaedah-kaedah pentafsiran yang terpakai untuk kontrak-kontrak komersial juga terpakai kepada pentafsiran polisi dalam kes ini. Dalam meneliti polisi insurans tersebut tujuan pihak-pihak mestilah diambil kira dan polisi tidak boleh ditafsirkan sebagai mengenepikan tujuan atau menjadikannya tidak praktikal. Hakim bicara dalam kes ini telah D mengambilkira keadaan-keadaan yang membawa kepada pembelian polisi insurans yang menjadi matlamat pengambilan polisi. Klausa 36(a) kerja-kerja kontrak menjadikannya jelas bahawa tidak kira walaupun sebahagian telah disiapkan dan sebahagiannya diambil oleh Kerajaan Persekutuan di bawah kontrak kerja, kontraktor hendaklah E memastikan semua kerja disiapkan, dan material-material dan barang-barang yang diinsuranskan sehingga projek disiapkan. Oleh itu, ia jelas bahawa hakim bicara adalah betul dalam mengambilkira kontrak kerja-kerja dan telah memyimpulkan bahawa tujuan pengambilan polisi insurans adalah sesuai menurut kontrak kerja, yang F mana di bawah klausa 36(a) memerlukan responden mengambil polisi insurans dengan perlindungan sewajarnya yang meliputi penyempurnaan kontrak-kontrak kerja dan pengambilalihan oleh Kerajaan Malaysia (lihat perenggan 26, 27 & 29).

G (2) Selanjutnya, sebagaimana penemuan hakim bicara, perayu telah diberitahu mengenai klausa 36(a) kontrak-kontrak kerja, yang merupakan matlamat pengambilan polisi insurans dalam kes ini (lihat perenggan 30).

(3) Hakim bicara membuat kesimpulan bahawa klausa perlindungan, yang H menjadi noktah terakhir kepada perlindungan insurans jika jambatan telah mula digunakan, adalah bertentangan dengan peruntukan penyelenggaraan, yang masih menyediakan perlindungan untuk 12 bulan selepas jambatan disiapkan dan digunakan. Percanggahan telah menyebabkan situasi kabur menimbulkan persoalan sama ada I pihak-pihak telah berhasrat untuk perlindungan akan berakhir bila sebahagian projek disiapkan yakni bila jambatan telah disiapkan atau bila sebahagiannya telah digunakan yakni bila jambatan telah dibuka untuk kegunaan awam. Bersandarkan kepada kekaburan tersebut hakim bicara adalah betul dalam menggunakan pentafsiran yang

meyebelahi responden dan oleh itu berpegang bahawa ganti rugi disebabkan banjir adalah termasuk dalam polisi insurans (lihat perenggan 31).

(4) Dalam kes rayuan ini, dengan mengesahkan tafsiran perayu dalam memberi perkataan-perkataan dalam polisi maksud yang jelas dan biasa akan membawa kepada keadaan-keadaan bahawa hanya kerana jambatan telah dibuka untuk kegunaan awam responden dinafikan dengan perlindungan di bawah polisi. Ia adalah sedemikian walaupun tujuan polisi adalah untuk menyediakan perlindungan sewajarnya bagi kerja yang telah disempurnakan, material-material dan barang-barang sehingga penyempurnaan keseluruhan projek tidak kira mana-mana bahagian yang disiapkan ataupun sebahagiannya diambil alih oleh kerajaan, dan ini adalah tidak masuk akal (lihat perenggan 34).

(5) Berkenaan sama ada responden telah membuktikan kehilangan yang didakwa iaitu RM765,812.20, didapati bahawa jumlah ini adalah jumlah anggaran yang berpatutan. Pada masa sama ia adalah benar bahawa bukti yang dikemukakan oleh perayu adalah kehilangan pelaras yang tidak boleh mengatakan berapa banyak yang diperlukan untuk memulihkan jambatan. Walau bagaimanapun, salah seorang daripada subkontraktor-subkontraktor bagi projek berkenaan yang dipanggil sebagai saksi untuk responden telah memberikan keterangan bahawa kos-kos yang terlibat dalam kerja-kerja pemulihan jambatan adalan lebih kurang RM380,000. Berdasarkan kepada keterangan tersebut award berjumlah RM765,812.20 yang dibuat oleh hakim bicara tidak boleh disokong. Oleh itu, jumlah RM765,812.20 yang dipohon dalam tuntutan daripada perayu di bawah polisi tidak dapat dibuktikan atas imbangan kebarangkalian (lihat perenggan 37–41).]

Notes

For cases on contractor's all risks policy in general, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 60–64.

Cases referred to

Central Lorry Service Co Sdn Bhd v The American Insurance Company [1981] 2 MLJ 40 (refd)

Chai v British American Insurance Co (M) Sdn Bhd [1987] 1 MLJ 53 (refd)

Cornish v The Accident Insurance Co Ltd (1889) LR 23 QBD 453 (refd)

Kandasamy v Mohamed Mustafa [1983] 2 MLJ 85 (refd)

Kler Knitwear Ltd v Lombard General Insurance Co Ltd [2000] Lloyd's Rep IR 47 (refd)

Provincial Insurance Co Ltd v Yeo Chee Swee [1984] 2 MLJ 60 (folld)

Reardon Smith Line Ltd v Yngvar Hansen-Tangen and Sanko Steamships Co [1976] 1 WLR 989 (refd)

Robertson v French (1803) 4 East 130 (refd)

Appeal from: Suit No K22–267 of 2002 (High Court, Kota Kinabalu).

PK Lim (Shelley Yap Leong Tseu Chong Chia & Co) for the appellant.
Ansari Abdullah (Ansari & Co) for the respondent.

Ahmad Maarop JCA (delivering judgment of the court):

THE FACTS

[1] The brief facts leading to this appeal are these. The appellant (the defendant in the High Court) is a limited company carrying on business as a general insurer. On 26 February 2002, the appellant changed its name to Alliance General Insurance Malaysia Bhd having its registered office at level 40, Menara Citibank, 165 Jalan Ampang, PO Box 12485, 50780 Kuala Lumpur.

[2] By a letter of award dated 1 January 1998 ('the letter of award'), the Government of Malaysia through Jabatan Kerja Raya Sabah appointed the respondent (the plaintiff in the High Court) as the contractor to carry out and complete a project described as 'Projek Membina Jalan Beaufort-Mesapol Negeri Sabah' (Pakej D3-C)(Km 24-Km 38) ('the project'). The project included the construction of a bridge over Sungai Lingkungan ('the bridge').

[3] Pursuant to the letter of award, the respondent was required to provide, inter alia, insurance of works policy and contractor's all risks insurance policy with the validity or coverage until 31 January 2002. So, sometimes in July 1998 or thereabout, the respondent applied to the appellant for the issuance of the required insurance policy for the project.

[4] The appellant issued a contractors all risks policy No 98EKKOOO28 ('the policy'), whereby the appellant agreed to insure the respondent for the project for the period from 10 July 1998 to 31 January 2002. This included a 12 month maintenance period. Under the policy, the appellant agreed to insure the respondent against loss and damage to the contract works subject to the terms, exceptions and conditions of the policy.

[5] Under the policy, the appellant agreed to indemnify the respondent for loss and damage in respect of each and every occurrence of, inter alia, earthquake, volcanism, tsunami, storm, hurricane, cyclone, flood, inundation, any water damage, collapse, subsidence, landslide, and landslip subject to the terms and conditions thereof.

[6] However, the policy contained the following clause:

PERIOD OF COVER

The liability of the insurers shall commence notwithstanding any date to the contrary specified in the Schedule, directly upon commencement of work or after the unloading of the items entered in the schedule at the site. *The insurers' liability expires for parts of the Insured contract works taken over or put into service.*

(Emphasis added.)

[7] The bridge, which was part of the project was completed in 1999 and it was opened for use by the public. In this connection it must also be added that there is evidence to show that before the construction of the bridge, there was an existing bridge over Sungai Lingkungan about 2km from the where the bridge was constructed. During construction of the bridge, the existing bridge was used by vehicles to cross over the river. Even though the whole project had yet to be completed, when the bridge was completed, it was opened for use by the public. This appears to be in line with the provision under cl 36(a) of the contract relating to the project between the Government of Malaysia and the respondent ('the works contract'). More will be said about this clause later in this judgment. The purpose of opening the bridge for use by the public was to ensure that there was no interruption on the traffic flow across the river.

[8] On or about 23 November 2000, the bridge was damaged by a flood and/or storm. The respondent carried out repair works for the bridge.

[9] On 14 April 2001 the respondent submitted its claim to the appellant demanding payment for the cost of repair of the bridge. The appellant denied liability. The respondent sued the appellant under the policy and claimed RM765,812.20. The appellant's defence, relying on the provision on the cover period under the policy, was that since the bridge was already put into service, its liability under the policy expired.

[10] On 17 November 2006, the learned judge of the High Court entered judgment for the respondent in the sum of RM765,812.20 together with interest thereon at 8% per annum from 22 February 2001 until payment. The learned judge did not award cost to the respondent because of its failure to comply with certain directions for trial issued by the court.

[11] Being dissatisfied with the aforesaid decision of the High Court, the appellant filed an appeal. Hence this appeal.

[12] Before us the parties submitted on the issues of liability and quantum.

DECISION OF THE COURT

LIABILITY

[13] The issue of liability involves the construction of the provision relating to the period of cover under the policy. In the court below the learned judge held as follows:

> In so far as the facts are concerned, there is no dispute that the bridge was completed in 1999 and opened for use by the public and that the bridge was a part of the contract entered into between the government and the plaintiff. Therefore, giving the plain, natural and ordinary meaning of the words of that clause, it would mean that when the bridge was completed and being used by the public, it was a part of the insured contract works that were put into service for which the defendant would not be liable. But the plaintiff had argued that the purposive approach to interpretation should prevail or else the cover for the 12 months maintenance period would be rendered illusory because the maintenance period can only come into play after the bridge was completed and also after it was put into use because it cannot be imagined that a bridge should be left idle for 12 months after completion so as to enjoy the period of the insurance. At the very least there appears to be a contradiction in terms when on the one hand you have a provision that puts an end to cover if the bridge was put into use while on the other there is a provision to still provide for cover for 12 months after the bridge was completed and put into use, I included out into use because it must have been envisaged by the parties giving the circumstances leading to the purchase of the insurance which was that the defendant was made aware of the contract which required the plaintiff to take out a policy with the necessary cover, including coverage for works completed and taken over by the government. That provision, cl 36(a) reads:
>
> > Insure against loss and damages by inter alia, storm, tempest, flood … All works executed … to the full value thereof … and shall keep such work, materials and goods so insured until the completion of the whole of the works, notwithstanding any arrangement for sectional occupation or Partial Occupation by the Government under this contract.
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> I am thus in agreement with counsel for the plaintiff that going by the contra preferentum rule, the construction favourable to the plaintiff must be adopted and therefore the damage by the flood was covered by the policy though by then it was already put into use since there was also a provision covering the maintenance period which presupposes the bridge being put into use after its completion. It is surprising that the defendant persisted in resisting the claim because if they had succeeded it would mean that the government should never accept any policy issued by the defendant in respect of government contracts that involve infrastructure that are going to be used by the public if the government is not to be under-protected.

[14] Before us learned counsel for the appellant submitted that a policy of insurance is basically subject to the same rules of construction as any other written contract. The words used in it must be given their plain ordinary meaning but in the context of the policy looked at as a whole and subject to any special definition contained in the policy. Reliance was placed on the Federal Court decision in *Provincial Insurance Co Ltd v Yeo Chee Swee* [1984] 2 MLJ 60.

[15] Learned counsel for the appellant admitted that if there was an ambiguity it should be resolved in favour of the insured. He relied on the Privy Council decision in *Kandasamy v Mohamed Mustafa* [1983] 2 MLJ 85 and the Federal Court decision in *Central Lorry Service Co Sdn Bhd v The American Insurance Company* [1981] 2 MLJ 40.

[16] He then contended that there must be a genuine ambiguity in construction before the contra proferentum rule could apply, and he cited *Chai v British American Insurance Co (M) Sdn Bhd* [1987] 1 MLJ 53 in support.

[17] Submitting further, learned counsel for the appellant said that the contra proferentum rule ought to be applied only for the purpose of removing a doubt, and not for the purpose of creating a doubt, or magnifying an ambiguity. He then contended that that was precisely what the learned judge did. According to him, 'the learned judge manufactured ambiguity because he did not like the effect of the plain and ordinary meaning of the cover clause'. He contended that in doing so, the learned judge had erred.

[18] It was also submitted on behalf of the appellant that the learned judge erred when he used the works contract to support his construction of the policy.

[19] In reply, while not disputing that an insurance policy is subject to the same rules of construction like any other contract, learned counsel for the respondent submitted that the contract of the policy must be looked at as a whole. Referring to *Provincial Insurance v Yeo Chee Swee*, he argued that the intention of the parties was the overriding factor in the Federal Court's refusal to strictly follow the ordinary meaning of the words of the policy and instead apply the maxim *nonscitur a sociis* in dismissing the appeal in that case.

[20] Learned counsel for the respondent then submitted that in the present case, the literal meaning should not be allowed to prevail as it would produce an unrealistic and generally unanticipated result in which the insurer would be absolved of the very risk sought to be covered under the policy. He submitted that the intention of the parties in this case was the provision of

a policy with the necessary cover including coverage for works completed and taken over by the Government of Malaysia. Defending the judgment of the learned judge, learned counsel for the respondent submitted that in the circumstances of this case the learned judge could not be faulted for applying the purposive approach in enforcing the intention of the parties.

[21] That a policy of insurance is basically subject to the same rules of construction as any other written contract is abundantly clear from the authorities. In the words of Hashim Yeop A Sani FJ delivering the judgment of the Federal Court in *Provincial Insurance Co Ltd v Yeo Chee Swee*:

> the words used in it must be given their plain, ordinary meaning *but in the context of the policy looked at as a whole* and subject to any special definition contained in the policy.
>
> (Emphasis added.)

[22] The rule that the policy, like all other instruments, is to be construed according to its sense and meaning, as collected from the words used in it, which are to be understood in their plain and ordinary meaning was established as early as in 1803 in *Roberton v French* (1803) 4 East 130. That the words in the policy is to be understood in their plain, ordinary and popular sense is subject to a number of exceptions, one of which being that the context evidently points out that the words must in the particular instance, and in order to effectuate the immediate intention of the parties to the contract, be understood in some other special or peculiar sense. This is clear from the judgment Lord Ellenborough CJ in that case:

> In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable to the terms of other instruments and in all other cases: *it is therefore proper to state upon this head, that the same rule of construction which applies to all other instruments applies equally to this instrument of a policy insurance, viz that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense*, unless they have generally in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; *or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense*.
>
> (Emphasis added.)

[23] In construing the policy, the object of the parties is to be steadily borne in mind and the policy must not be construed so as to defeat that object, nor as to render it practically illusory. This was stated by Lindley LJ,

delivering the judgment of the English Court of Appeal in *Cornish v The Accident Insurance Co Ltd* (1889) LR 23 QBD 453:

> … To ascertain the true meaning of the exception the whole document must be studied and *the object of the parties to it must be steadily borne in mind. The object of the contract is to insure against accidental death and injuries, and the contract must not be construed so as to defeat that object, nor so as to render it practically illusory.*
>
> (Emphasis added.)

[24] Considering the judgment of the court below, the relevant part of which we have set out, there is no doubt that the object of the parties was in learned judge's mind. He had foremost in his mind, the object of taking the insurance policy in this case and the intention of the parties. In doing so the learned judge had taken into account the circumstances leading to the purchase of the insurance which was that the defendant was made aware of the works contract which required the plaintiff to take out a policy with the necessary cover, including coverage for works completed and taken over by the government. That provision, cl 36(a) reads:

> insure against loss and damages by inter alia, storm, tempest, flood … All works executed… to the full value thereof … and shall keep such work, materials and goods so insured until the completion of the whole of the works, notwithstanding any arrangement for sectional occupation or Partial Occupation by the Government under this contract.

[25] Learned counsel for the appellant contended that the learned judge erred when he took into account the works contract in construing the relevant terms of the policy. With respect, we do not agree. For reasons which will set out shortly, we are of the view that the learned judge did not err in taking that approach. We derive support for our view from the House of Lords' decision in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen and Sanko Steamships Co* [1976] 1 WLR 989. The case concerned the construction of two charter parties. In the course of his judgment at pp 995–996, Lord Wilberforce made the following observation on the correct approach to the construction of commercial contracts:

> The contract is in the English language and (cl 40) is to be construed in accordance with English law. But it has been sought to introduce, as an aid to construction, a considerable amount of evidence as to Japanese usages and practice, some of which was in fact taken into account by the Court of Appeal. To decide how far this is legitimate one must make a distinction. When it comes to ascertaining whether particular words apply to a factual situation or, if one prefers, whether a factual situation comes within particular words, it is undoubtedly proper, and necessary, to take evidence as to the factual situation. Thus once one has decided what is meant by 'Yard No 354,' or 'to be built at a Yard' it is proper by evidence to establish the characteristics of particular yards, the numbering used at those

yards, and the 'building' which may have been done, in order to answer, yes or no, the question whether the contractual requirements have been met. There is no difficulty, in law, about this part of the case.

It is less easy to define what evidence may be used in order to enable a term to be construed. To argue that practices adopted in the shipbuilding industry in Japan, for example as to subcontracting, are relevant in the interpretation of a charterparty contract between two foreign shipping companies, whether or not these practices are known to the parties, is in my opinion to exceed what is permissible. *But it does not follow that, renouncing this evidence, one must be confined within the four corners of the document. No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.*

(Emphasis added.)

Then, after giving a few illustrations by referring to a number of cases, His Lordship went on to consider the purpose of the charterparties as well as the factual background against which they were made:

I think that all of Their Lordships are saying, in different words, the same thing — *what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were. All of these opinions seem to me implicity to recognise that, in the search for the relevant background, there may be facts which form part of the circumstances in which the parties contract in which one, or both, may take no particular interest, their minds being addressed to or concentrated on other facts so that if asked they would assert that they did not have these facts in the forefront of their mind, but that will not prevent those facts from forming part of an objective setting in which the contract is to be construed. I shall show that this is so in the present case.*

So I ask what was the commercial purpose of these charterparties and what was the factual background against which they were made? The purpose is clear: it was to make available to (1) Hansen-Tangen and (2) to Reardon Smith a medium-sized tanker suitable for use as such, this tanker not being in existence, or even under construction at the date of either charter, and, at the date of the intermediate charter not even the subject of contracts made by the supplying company. The vessel was to be constructed in a Japanese yard and made available on charter to Sanko as part of a programme. At the date of the sub-charter the vessel was identified in contracts for its construction in Japan and had a serial number. In order to ensure that the tanker was suitable for its purpose a detailed specification was drawn up — by way of a warranted description with which of course the vessel must strictly comply.

In addition, since at the time of either charterparty the vessel was not in existence or under construction, some means had to be agreed upon for identifying the particular vessel — one out of a programme — which would form the subject matter of the charters. This was indispensable so as to enable those committing

themselves to hire the vessel, to sub-hire it, if they wished, and if necessary to arrange finance. This necessary identification was to be effected by nomination, by Sanko in the first place and then by Hansen-Tangen.

The text of the charterparties confirms beyond doubt that this was what was intended and done.

(Emphasis added.)

[26] We have said earlier that a policy of insurance is subject to the same rules of construction as any other written contract. So, in our view the observation made by Lord Wilberforce on the correct approach to the construction of commercial contract as aforesaid applies to the construction of the policy in the instant appeal.

[27] It appears to us that having taken into account the works contract, particularly the provision under cl 36(a), the learned judge concluded that the object of taking the insurance policy was necessarily to comply with the works contract, which under cl 36(a), required the respondent to take out an insurance policy with the necessary cover which included coverage for contract works completed and taken over by the Government of Malaysia.

[28] Clause 36(a) of works contract provides that:

Insurance of Works

(a) The Contractor shall in the joint names of the Government and Contractor insure against loss and damage by fire, lightning, explosion, storm, tempest, flood, ground sub-sidence, bursting or overflowing of water tanks, apparatus or pipes, aircraft and other aerial devices or articles dropped therefrom, riot, civil commotion, all work executed and all unfixed materials and goods, delivered to, placed on or adjacent to the Works and intended therefore (but excluding temporary building, plant, tools and equipment owned or hired by the Contractor or any sub-contractor, nominated or otherwise) to the full value thereof (plus any amount which may be specifically stated in the Appendix to these Conditions or elsewhere in the Contract Documents) and *shall keep such work, materials and goods so insured until the completion of the whole of the Works, notwithstanding any arrangement for Sectional Completion or Partial Occupation by the Government under this contract.* Such insurance policy or policies shall provide expressly for payment in the first place to the Government of any insurance monies due under the policy or policies.

(Emphasis added.)

A **[29]** We accept the learned judge's conclusion on the object of taking out the policy. In saying so we have not lost sight of the fact that under cl 36(a) of the works contract, it is clear that irrespective of any sectional completion and partial occupation by the Federal Government under the works contract, the contractor shall keep all work executed, materials and goods insured until
B the completion of the whole project.

[30] Next, as could be seen from his judgment, upon considering the circumstances leading to the purchase of the policy by the respondent, the
C learned judge found that the appellant was made aware of the requirement under cl 36(a) of the works contract, and hence the object of taking out the policy in this case. We cannot find fault with such a finding by the learned judge in the light of the evidence available before him.

D **[31]** This brings us to the reason why the learned judge decided to use the contra preferentum rule and adopted the construction favourable to the respondent. The learned judge accepted the respondent's submission that giving effect to the words in the clause on the cover period their plain, natural and ordinary meaning, would mean that when the bridge was used by the
E public (ie put into service), it was part of the insured contract works that would be put into service, thereby ending the appellant's liability. Such an interpretation would render the 12 month maintenance period illusory because the maintenance period could only come into play after the bridge was completed and after it was put into use. The learned judge concluded
F that the clause on the cover period which put an end to the insurance cover if the bridge was put into use was contradictory to the maintenance provision which still provided for cover for 12 months after the bridge was completed and *put into use*, and the learned judge said he had added 'put into use' because cl 36(a) of the works contract, of which the appellant was well aware,
G required the taking of a policy with the necessary cover, including coverage for works completed and taken over by the government. It appears to us that this contradiction created an ambiguous situation raising the necessary question whether the parties had actually intended the cover to end when there was a sectional completion of the project (and this occurred when the
H bridge was completed) or when there was partial occupation (and this occurred when the bridge was opened for use by the public), even though the object of taking the insurance was to obtain the necessary cover, for the executed work, material and goods until the completion of the whole project, irrespective of any sectional completion or partial occupation by the
I government? So, with respect, we find no merit in the contention of learned counsel for the appellant that 'the learned judge manufactured ambiguity because he did not like the effect of the plain and ordinary meaning of the cover clause'. In the face of such an ambiguity, the learned judge adopted the construction favourable to the respondent and held that the damage by flood

was covered by the insurance policy. We agree with him. In our view to construe the policy in the manner contended by the appellant would be to negate the very purpose of taking out the policy and would lead to absurdity.

[32] To illustrate the point we refer to *Kler Knitwear Ltd v Lombard General Insurance Co Ltd* [2000] Lloyd's Rep IR 47. In that case the plaintiff, a company manufacturing hosiery and knitwear insured its business with the defendant. The plaintiff's insurance policy was renewed on 15 July 1998. The policy contained the following endorsements:

> WASTE WARRANTY.
>
> It is warranted that all trade waste including saw-dust, shavings and other combustibles are swept up at the end of each working day and deposited in metal receptacles fitted with metal lids and removed from the premises at least once each week.
>
> SPRINKLER INSTALLATIONS WARRANTY.
>
> It is warranted that within 30 days of renewal 1998 the sprinkler installations at the Jellicoe Rd/Gough Rd/Spalding Rd locations must be inspected by a LPC approved sprinkler engineer with all necessary rectification work commissioned within 14 days of the inspection report being received.

[33] The plaintiff did not arrange for an inspection of the sprinkler installation until 25 August 1998, which was beyond the 30 day period provided under the sprinkler installation warranty. On 27 October 1998, the insured premises was damaged by a storm. The plaintiff made a claim for losses arising from damage to its raw materials and finished products as well as from the disruption of its business. The defendant argued that the plaintiff's claim was barred by the breach of the sprinkler inspection warranty clause which, according to the defendant was a true contractual warranty. The court held that although the clause relating to the inspection of the sprinkler warranty was labelled as a warranty by the defendant, it could not be construed as a warranty because it would lead to absurdity in the context of the policy. In the course of his judgment, Morland J said:

> I shall answer the construction question first. *I shall begin by setting out the principles and guidelines upon which I must approach the question of construction.*
>
> *My task is to ascertain the intention of the parties. That intention is to be derived from the clause in the context of the policy as a whole set against its contractual matrix. That matrix was that on the other side a manufacturing company was seeking in short all risks cover in respect of its commercial premises and on the other side an insurance company was offering such cover through a policy with its endorsements the language of which was of its own authorship.*
>
> *If, on a proper construction of a clause, the intention of the parties was that the clause should be a warranty, the court must uphold that intention by giving effect to the warranty however harsh and unfair the consequences to the insured may be.*

It is wholly irrelevant to the question of construction that as in this case the insured loss had no causative link with his breach of obligation. Presumably the primary purpose of the clause was to reduce the risk of loses from fire. A possible secondary purpose was to reduce the risk of water damage due to malfunction of the sprinkler system. *If the clause is a warranty, and the policy spells out that a claim is barred, it matters not that storm damage rather than fire or malfunction of the sprinkler system caused the loss.*

The facts that the clause is entitled warranty and contains the phrase it is warranted that are some indication that the parties intended that the clause be a warranty in the true sense of the word. Such words are frequently used in insurance policies and used in a wide variety of senses. A warranty in a proposal form that statements of existing facts are true and accurate is a world apart from a warranty which in effect is a promise as to future conduct. The former is clearly crucial to the assessment of risk and the level of premium. The latter too may affect the assessment of risk and the level of premium because a proposed insured who is willing to give an obligation as to his future conduct may be giving an indication of his reliability and business efficiency. Still unbroken or unfulfilled promises as to the future conduct as opposed to the future existence of a state of affairs are of a very different character to breaches of warranties as to existing facts. … Mr McLaren drew my attention to the similar wording in both the Waste Warranty and the sprinkler installation warranty. *It would be utterly absurd and make no rational business sense whatever if at the end of a particular working day a small quantity of sawdust was not swept up and 300 days later a fire broke out due to an electrical fault that a claim for property damage would be barred; similarly if inspection of the sprinkler system was not carried out on time. Although it is wholly irrelevant on the matter of construction.* In fact the inspection was said to be out of time because parts of the sprinkler system were in units not in the claimants control and there were difficulties in gaining access.

I have come to the clear and unhesitating conclusion that the clause is a suspensive condition and not a warranty.

[34] Similarly, in the instant appeal, upholding the interpretation advocated on behalf of the appellant would lead to the consequence that merely because the bridge was opened to use by the public, the respondent is deprived of the cover under the policy even though the very purpose of the policy was to provide the necessary cover for executed work, materials and goods *until the completion of the whole project, irrespective of any sectional completion or partial occupation of the project by the government*. This to our mind is absurd. If, even sectional completion or partial occupation of the project by the government is not a sufficient excuse for not providing cover until the completion of the whole project, we cannot see how opening the bridge for public use can be a sufficient excuse for the same.

[35] In conclusion, for reasons which we have explained at length the decision of the learned judge on the liability of the appellant to pay the respondent under the insurance policy is affirmed.

[36] The next question is how much is the respondent entitled to be paid by the appellant? This brings us to the question of quantum.

QUANTUM

[37] The gist of the appellant's submission on this issue was that the respondent failed to prove that it had suffered the damage of RM765,812.20 claimed by it. The respondent contended that it had proven the damage claimed, on the balance of probability.

[38] In his judgment the learned judge held as follows:

> As for the quantum of damages, it must be said that once the defendant elected to give evidence at the end of the case for the plaintiff, it means that the defendant had accepted that there is evidence adduced to support the claim by the plaintiff for the amount claim. Having so elected the defendant offered nothing to rebut the evidence adduced by the plaintiff as to how much it cost the plaintiff to carry out the remedial works that were done by the subcontractor who was called to testify. The only evidence adduced by the defendant was that of an adjuster who could not say nor had the evidence to say how much it would cost to remedy the damage. In the end, I am compelled to conclude that the plaintiff had proven its claim.

[39] It is true that the only evidence adduced by the appellant was that of a loss adjuster who could not say how much it would cost to remedy the bridge. But then the question is whether, in the first place the respondent had proven its alleged loss? The respondent called four witnesses to testify but we find that its case on the damage claimed rests on the evidence of PW2 and PW3. PW2's evidence was based on a document described as *The Proposal Made For The Reinstatement And Remedial Works For Damages Caused By Flood To The Sg Lingkaran Bridge, Sipitang*. It was admitted by PW2 that the document was a proposal as to how the remedial works were to be carried out. It contained, inter alia, the methodology, proposed construction sequence, machines and equipment, scope of works, work duration and quotation in the attached bill of quantities. From the bill of quantities, the total figure worked out was RM765,812.20. In our judgment, that figure was just an estimated cost of repair. We find nothing in the evidence to prove that RM765,812.20 was the actual cost of repair.

[40] Then we have the evidence of PW3, a contractor who was the owner of Babankong Sdn Bhd, one of the subcontractors for the project. According to PW3, they were instructed to come back to do remedial works on the bridge. PW3 said that the remedial works included repair of structure, reinstatement of alignment to put it into the original design and the sum involved was RM380,000 plus. Under cross-examination, PW3 remained firm. He said:

A There was negotiation for reduction of our fees for the remedial works. Costs of RM380,000 for remedial works to be done for the bridge was not the original quoted price, it was the agreed rate after negotiation. I quoted higher than that. RM171,900 still outstanding.

B **[41]** In our view, in the light of PW3's evidence, the award of RM765,812.20 made by the learned judge cannot be supported. On the evidence available before the court it was not proven on the balance of probability that RM765,812.20 was the actual cost of repair of the bridge which the respondent sought to claim from the appellant under the policy.

C

[42] However, on the evidence of PW3 we are satisfied that the respondent had incurred RM380,000 being the cost of repair of the bridge.

D **[43]** In the result we dismissed the appeal with costs. For reasons which we have explained, the award of RM765,812.20 made by the learned judge is substituted with an award of RM380,000 minus RM7,500, being a deductible under the insurance policy.

E **[44]** The cross appeal is also dismissed with costs.

Appeal and cross-appeal dismissed with costs.

Reported by K Nesan

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